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IN THE

Supreme Court of the United States

THOMAS J. CAHILL,
in his official capacity as Chief Counsel for the Departmental Disciplinary Committee for the Appellate Division of the New York Court of Appeals, First Department, *et al.*,

Petitioners,

v.

JAMES L. ALEXANDER, ALEXANDER & CATALANO LLC, and PUBLIC CITIZEN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the States may, consistent with the First Amendment, restrict attorney advertising that involves unverifiable claims, including implied claims about the quality of attorneys' legal services, and marketing techniques that do not assist the public in the intelligent selection of counsel.

LIST OF PARTIES

Complete List of Petitioners:

THOMAS J. CAHILL, in his official capacity as Chief Counsel for the Departmental Disciplinary Committee for the Appellate Division of the New York Court of Appeals, First Department, DIANA MAXFIELD KEARSE, in her official capacity as Chief Counsel for the Grievance Committee for the Second and Eleventh Judicial Districts, GARY L. CASELLA, in his official capacity as Chief Counsel for the Grievance Committee for the Ninth Judicial District, RITA E. ADLER, in her official capacity as Chief Counsel for the Grievance Committee for the Tenth Judicial District, MARK S. OCHS, in his official capacity as Chief Attorney for the Committee on Professional Standards for the Appellate Division of the New York Court of Appeals, Third Department, ANTHONY J. GIGLIOTTI, in his official capacity as acting Chief Counsel for the Grievance Committee for the Fifth Judicial District, DANIEL A. DRAKE, in his official capacity as acting Chief Counsel for the Grievance Committee for the Seventh Judicial District and VINCENT L. SCARSELLA, in his official capacity as acting Chief Counsel for the Grievance Committee for the Eighth Judicial District.

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The Attorney General of the State of New York, on behalf of Thomas J. Cahill, Diana Maxfield Kearse, Gary L. Casella, Rita E. Adler, Mark S. Ochs, Anthony J. Gigliotti, Daniel A. Drake, and Vincent L. Scarsella, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 598 F.3d 79. The decision and order of the district court (Pet. App. 51a-89a) is reported at 634 F. Supp. 2d 239.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2010. On May 25, 2010, Justice Ruth Bader Ginsburg granted petitioners an extension of time, to and including August 9, 2010, to file a petition for certiorari. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The attorney advertising rules involved in this litigation provide, in relevant part:

> Information About Legal Services
>
> Rule 7.1: Advertising.
>
> . . .
>
> (c) An advertisement shall not:
>
> (1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending . . .
>
> (3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case . . .
>
> (5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence . . .
>
> (7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

22 N.Y.C.R.R. pt. 1200, Rules 7.1(c)(1), (3), (5), and (7) (2009).

STATEMENT

This case presents a recurring issue of national importance: whether the States may, consistent with First Amendment principles governing commercial speech, restrict certain types of attorney advertising that incorporate unverifiable and subjective claims that are made to attract clients. In particular, the types of advertising at issue include, *inter alia*, attorneys' use of slogans and trade names that make implied claims about the quality of their legal services (such as "the best in the business"), and marketing gimmicks (such as exaggerated dramatic effects) that do not impart objective information that informs the public about facts that are relevant to the attorneys' legal services.

This action was filed by, among others, a law firm that sought to market itself as "the Heavy Hitters" and use exaggerated dramatic effects in its television commercials (including depictions of its lawyers towering over buildings and giving legal advice to space aliens). The court below struck down new advertising rules, promulgated by the New York courts, that prohibit such marketing techniques. In so doing, the court of appeals sharply departed from the conclusions and reasoning of numerous state courts of last resort.

This Court's intervention is needed to bring uniformity to the law on a subject that directly affects the States' traditional powers to regulate the conduct of attorneys who are licensed to practice within their borders, and to protect consumers from deceptive and misleading advertising. That is particularly so because, over three decades ago, this Court anticipated—but did

not definitively resolve—the question presented by this case. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court's first decision addressing commercial-speech protections for attorney advertising, the Court acknowledged that it would "leave . . . for another day" "the peculiar problems associated with advertising claims relating to the quality of legal services." *Id.* at 366 (emphasis omitted). In particular, the Court noted that "advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." *Id.* at 383-84. This case presents an ideal vehicle for resolving the question left unanswered in *Bates*.

A. Commercial-Speech Principles in the Context of Attorney Advertising

While "[c]onstitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage," *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 622 (1995), "[i]t is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection." *Id.* at 623 (citations omitted).

That protection, however, is "not absolute," and this Court has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Id.* "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns," and thus "falls within the State's proper sphere of economic and professional regulation." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 459 (1978). As a result,

"[c]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Went For It*, 515 U.S. at 623 (quotation marks and citations omitted; brackets and second alteration in original).

As a general matter, then, government rules restricting attorney advertising are subject to only "'intermediate' scrutiny" under the framework of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). *See Went For It*, 515 U.S. at 623-24.

As this Court has explained:

> Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of those categories . . . may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.

Id. (quotation marks omitted); *see also In re R.M.J.*, 455 U.S. 191, 202 (1982) ("regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the

record indicates that a particular form or method of advertising has in fact been deceptive").

As noted above, and described in more detail below, this Court has suggested (without definitively deciding) that the government may be permitted to prohibit certain claims in attorney advertising that "are not susceptible of measurement or verification," and which "may be so likely to be misleading as to warrant restriction." *Bates*, 433 U.S. at 383-84. The New York rules invalidated by the court of appeals in this case address precisely such claims.

B. Factual Background

1. The attorney advertising rules at issue in this case originated in proposals made by the New York State Bar Association Task Force in 2005.The *Report and Recommendations of [the] Task Force on Lawyer Advertising* ("*Task Force Report*") was included in the record below, and is available online.[1] The *Task Force Report* explained that the Task Force was created to address "increasing concern over lawyer advertising as contributing to the lack of public understanding about lawyer marketing" (*Task Force Report* at 1).

The Task Force observed that its mission was urgent, citing a "surge of broadcast media, billboard, internet, blogs, and other forms of electronic communications by lawyers aimed at reaching the consumer in new ways" (*Task Force Report* at 2). These

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1. New York State Bar Association, *Report and Recommendations of Task Force on Lawyer Advertising* (Oct. 21, 2005), http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=2752&TEMPLATE=/CM/ContentDisplay.cfm.

new avenues for attorney advertising, the Task Force explained, caused the Force "to question whether the existing rules and procedures are adequate to meet the public interest and ensure that consumers receive high-quality legal services" (*Task Force Report* at 2). As part of its research, the Task Force undertook a comprehensive examination of New York's existing attorney advertising rules and those of other States, reviewed this Court's First Amendment attorney advertising jurisprudence, and evaluated nearly 200 attorney advertisements published in New York State (*Task Force Report* at 4-7, 46-48).

In a report issued in October 2005, the Task Force identified the proliferation of false, deceptive or misleading advertisements and the lack of enforcement resources as among the biggest problems faced by the bar and the judiciary in regulating attorney advertising in New York (*Task Force Report* at 5). To address these concerns, the Task Force recommended a number of rules to the Appellate Division of the New York State Supreme Court (the "Appellate Division"), an appellate court that, among other things, promulgates rules of professional conduct for New York lawyers. The Task Force proposed restrictions on various aspects of attorney advertising, including, *inter alia*, use of trade names and client testimonials (*Task Force Report* at Tab 1, pp. 10-11, 32). And, in January 2006, the New York State Bar Association's House of Delegates approved the rules proposed by the Task Force (*Task Force Report* Cover).

2. After considering the proposed rules, and after receiving extensive comments on its own proposed amendments to New York's attorney advertising rules (Pet. App. 93a), on January 4, 2007, the Appellate Division adopted the new advertising rules challenged in this litigation. The rules were to take effect on February 1, 2007. (Pet. App. 93a).

Of particular relevance here, under the heading, "Information About Legal Services," the new rules prohibit attorney advertisements that "utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter." 22 N.Y.C.R.R. pt. 1200, Rule 7.1(c)(7).[2] This rule thus prohibits the use of marketing slogans and catch-phrases that contain claims about the quality of legal services provided (*i.e.*, the "results" implied), such as the slogans, "the best in the business" or "always winners."[3] Because of the uncertainties inherent in any projection of results that is implied by an unadorned "nickname, moniker, motto or trade name," such quality-of-services claims are necessarily subjective and unverifiable.

In a similar vein, the new rules prohibit the use of advertising "techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence." *Id.*, Rule 7.1(c)(5). This rule targets

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2. Since the court below issued its decision, the relevant rules have been re-numbered in the New York Compilation of Codes, Rules and Regulations ("N.Y.C.R.R."), a revised citation format that we follow herein. The substance of the rules has remained unchanged throughout the course of this litigation.

3. This is confirmed by the fact that the rule (like the other content-based rules at issue in this litigation) only applies to an "advertisement" by an attorney, which is defined as "any public or private communication made by or on behalf of a lawyer or law firm *about that lawyer or law firm's services*, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers." 22 N.Y.C.R.R. pt. 1200, Rule 1.0(a) (emphasis added).

marketing gimmicks and other attention-grabbing techniques (such as exaggerated depictions of lawyers with superhuman powers) that do not contain relevant and objective information about the legal services offered.

The new rules adopted by the Appellate Division also prohibit client testimonials with respect to matters that are still pending (*id.*, Rule 7.1(c)(1)) and the portrayal of a judge, a fictitious law firm, or the use of a fictitious name that inaccurately implies that lawyers are associated together in a law firm (*id.*, Rule 7.1(c)(3)). Finally, the rules establish a prohibition on soliciting accident victims and their families within a thirty-day period—or, under some circumstances, a fifteen-day period—following an accident (*id.*, Rule 7.3(e)), though that rule is no longer at issue in this litigation.

3. This is a suit for declaratory and injunctive relief brought by a personal-injury law firm (Alexander & Catalano LLC), the managing partner of the firm (James L. Alexander), and a nonprofit advocacy organization that conducts constitutional litigation (Public Citizen).

Before the New York judiciary adopted its new advertising rules, Alexander & Catalano regularly promoted its legal services using broadcast, internet, and print advertisements. In particular, the firm marketed itself using the slogan, "the Heavy Hitters," which was prominently featured in its television commercials and on its website. *See* Pet. App. 91a; *see also* Alexander & Catalano Home Page, *http://alexanderandcatalano.com*. The firm's broadcast commercials also frequently employed exaggerated

portrayals of the firm's attorneys, who were depicted as, for example, giants towering over local buildings. In other instances, the attorneys were shown running to assist clients so fast that they appear as a blur, and counseling space aliens on insurance claims. *See* Alexander & Catalano, *Commercials*, *http://alexanderandcatalano.com/videos/commercials*.

Defendants are the chief counsels of the disciplinary committees that enforce New York's rules of professional conduct for attorneys under the direction of the Presiding Justices of each of the four Judicial Departments of the Appellate Division. *See generally* 22 N.Y.C.R.R. pt. 1200; *see also* N.Y. Judiciary Law § 90(2).

4. Plaintiffs filed their complaint on February 1, 2007, the day that the Appellate Division's new advertising rules were to take effect (Pet. App. 98a-117a). As is relevant here, plaintiffs sought to enjoin defendants from enforcing the new rules concerning the use of trade names, monikers and nicknames that imply an ability to obtain results; attention-grabbing techniques that clearly and intentionally have no relevance to legal competence; testimonials concerning pending matters; and the portrayal of judges and fictitious attorney relationships. Plaintiffs alleged that these restrictions violated their rights to engage in commercial speech protected by the First Amendment (Pet. App. 106a-109a).[4]

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4. In their complaint, plaintiffs also contended that the rules restricted the noncommercial speech of Public Citizen (Pet. App. 110a-114a), but they have since abandoned that claim. (Cont'd)

The plaintiff law firm and its managing partner further complained that the new rules would prevent them from employing the exaggerated imagery and catch phrases that they used to attract clients, including their depictions of giant attorneys and their use of the "Heavy Hitters" slogan (Pet. App. 108a-109a). They admitted that "the fictional traits exhibited by the lawyers" in their commercials "do not appear to be relevant to the selection of counsel" (Pet. App. 107a), but maintained that these attention-getting devices were necessary to entice "consumers of moderate means" who are allegedly "underserved by other attorneys" (Pet. App. 109a). Plaintiffs sought a declaration that the challenged portions of the Appellate Division's new rules were unconstitutional and an injunction barring enforcement of the rules (Pet. App. 116a).

C. Procedural Background

1. Plaintiffs moved for a preliminary injunction enjoining the rules, and defendants cross-moved to dismiss the complaint. The district court reserved decision on plaintiffs' motion, and denied defendants' cross-motion. The parties then stipulated to the relevant facts and exhibits, including the commercials that the plaintiff law firm intended to run but for the new rules.

(Cont'd)

As the court below noted, the "District Court accepted a narrowing construction of the [new rules] as inapplicable to non-commercial attorney communications," and on that basis dismissed plaintiffs' claims regarding application of the rules to noncommercial speech (Pet. App. 10a). Plaintiffs did not challenge that dismissal before the court of appeals.

2. On July 23, 2007, in response to cross-motions for summary judgment based on the undisputed facts and exhibits, the district court granted partial summary judgment to defendants and partial summary judgment to plaintiffs (Pet. App. 51a-89a). The court specifically found unconstitutional all of the new rules governing the content of attorney advertisements, while upholding against First Amendment challenge the restriction on solicitation of accident victims and their families within thirty days of an accident (*id.* at 88a-89a).

In particular, the district court summarily rejected New York's argument that the new rules reached only irrelevant, unverifiable and non-informational advertising that was not entitled to First Amendment protection under the first prong of the *Central Hudson* test for commercial speech (*i.e.*, whether the speech is deceptive, misleading, or involves unlawful activity) (Pet. App. 62a n.4). Proceeding to the remaining prongs of *Central Hudson* (which evaluate the speech-restrictions in light of the state interests that support them), the district court concluded that the rules violated the First Amendment, and struck down the rules on their face (Pet. App. 65a-74a).

3. In a two-judge decision,[5] the United States Court of Appeals for the Second Circuit affirmed in part and reversed in part. As is relevant here, the court upheld the district court's facial invalidation of all of the content-based regulations of attorney advertising (save for the

5. Justice Sotomayor was originally a member of the panel, but was elevated to this Court several months before the court of appeals issued its opinion.

rule prohibiting portrayals of fictitious law firms), while leaving intact the thirty-day rule on soliciting accident victims and their families. (Pet. App. 3a, 50a).

While acknowledging that "there are 'doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved'" (Pet. App. 16a) (citation omitted), the court of appeals followed the district court in rejecting the State's argument that the content-based rules regulate attorney advertising that is "irrelevant, unverifiable, and non-informational," and that such speech accordingly is not protected by the First Amendment (Pet. App. 15a-17a).

Having done so, the court next examined the challenged rules under the state-interest prongs of *Central Hudson*. Like the district court, the court of appeals acknowledged New York's "substantial" interests in (a) "protecting the public 'by prohibiting advertising and solicitation practices that disseminate false or misleading information,'" and (b) "preventing the erosion of confidence in the [legal] profession" caused by certain advertising techniques (Pet. App. 21a-22a) (citations omitted). With respect to the rule governing slogans and trade names that imply results, the court of appeals further acknowledged that "[t]here is a compelling, commonsense argument that, given the uncertainties of litigation, names that imply an ability to obtain results are usually misleading" (Pet. App. 29a).

Nonetheless, the court concluded that (with the sole exception of the rule concerning portrayals of fictitious

law firms), all of the content-based rules were invalid under the First Amendment. That was so, the court reasoned, because New York had failed to satisfy its evidentiary burden under the last two prongs of *Central Hudson* (*i.e.*, in showing that the rules directly and materially advance the State's interests, and that they are narrowly tailored). First, notwithstanding the State's reliance on "'history, consensus, and simple common sense,'" *Went For It*, 515 U.S. at 628, in support of the rules, the court of appeals concluded that the State had not "submitted any statistical or anecdotal evidence of consumer problems with or complaints of the sort they seek to prohibit" (Pet. App. 23a). Second, the court found that the rules failed the final prong of the *Central Hudson* test because, in the court's view, they "wholly prohibit[] a category of advertising speech that is *potentially* misleading, but is not inherently or actually misleading in all cases" (Pet. App. 32a). On these grounds, the court invalidated the rules on their face (Pet. App. 34a, 50a).[6]

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6. The court of appeals did so without examining whether any of the rules that it struck down could be applied in a constitutional fashion (for example, to prohibit the misleading slogan, "the best in the business"), and without addressing the well-established principle that the overbreadth doctrine (typically relied on in First Amendment cases to facially invalidate statutes and rules) does not apply to commercial speech. *See, e.g., Bd. of Trs of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483 (1989) (describing *Bates* as having "established the nonapplicability of overbreadth analysis to commercial speech"); *see also Bates*, 433 U.S. at 380-81. Neither the court of appeals nor plaintiffs below purported to rely on the vagueness doctrine to facially invalidate the rules.

REASONS FOR GRANTING THE PETITION

In enjoining the New York judiciary's rules on attorney advertising as inconsistent with the First Amendment, the decision below conflicts with the decisions of numerous state courts of last resort on an important and recurring question of federal law that this Court anticipated over thirty years ago but has not yet definitively answered.

This split of authority has far-reaching ramifications. According to the decision below, lawyers in New York may now advertise that they are "Heavy Hitters" or "the best in the business," and may use advertising gimmicks such as exaggerated visual depictions of their purportedly superior legal skills, even though such gimmicks convey no objective information that is relevant to the process of selecting qualified and competent counsel. On the other hand, numerous decisions of state supreme courts—including one that this Court left undisturbed in a summary dismissal—have held that the States may prohibit such marketing techniques without running afoul of the First Amendment.

Because the facts of this case are undisputed, and because there are no procedural obstacles to the Court's resolution of this important constitutional question, this case presents an ideal vehicle for bringing uniformity to the law.

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF STATE COURTS OF LAST RESORT

A. The Court of Appeals' Invalidation of the Implied-Results Rule Conflicts with Several State Supreme Court Decisions on the Question Whether the States May Prohibit Quality-of-Services Claims in Attorney Advertising.

In *Bates v. State Bar of Arizona*, 433 U.S. 350, this Court recognized that "advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." *Id.* at 383-84. Indeed, "because the public lacks sophistication concerning legal services," the Court explained, "misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.* at 383 (footnote omitted).

Five years later, this Court reaffirmed that "claims as to quality . . . might be so likely to mislead as to warrant restriction." *In re R.M.J.*, 455 U.S. 191, 201 (citing *Bates*, 433 U.S. at 383-84). And again, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the Court acknowledged that "our decisions have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services." *Id.* at 640 n.9 (citing *Bates*, 433 U.S. at 366); *see also Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988) (plurality

opinion) (quoting *Bates* dictum that "[a]dvertising claims as to the quality of legal services . . . may be so likely to be misleading as to warrant restriction").

The court below acknowledged in passing that this Court in *Bates* had "reserved the question of whether similar protection [under the First Amendment] would extend to 'advertising claims as to the quality of services [that] are not susceptible of measurement or verification'" (Pet. App. 15a). But its analysis of New York's rules failed to consider whether this Court's rationale for treating unverifiable quality-of-services claims differently from objective and verifiable claims in attorney advertising supported New York's argument that the former are unprotected by the First Amendment. Rather, in rejecting the State's argument that "irrelevant, unverifiable, and non-informational" statements in attorney advertising are not protected commercial speech (Pet. App. 15a-17a), and striking the New York rule prohibiting slogans and trade names that imply results, the decision below sharply departed from numerous decisions of state supreme courts across the country. These courts, in contrast to the Second Circuit, have held that the States may prohibit attorney advertising that contains similar subjective and unverifiable claims, including slogans and trade names that imply the quality or characteristics of legal services. Furthermore, breaking with the reasoning used by the court below, these courts have either explicitly or implicitly held that certain subjective quality-of-services claims are simply unprotected by the First Amendment.

For example, while the upshot of the decision below is that the plaintiff law firm in this case is free to continue

to market itself using the term "the Heavy Hitters"—a slogan that implies its ability to obtain superior results—the Supreme Court of Florida has held that attorneys may be subject to discipline, without offending the First Amendment, for their use of the slogan "pit bull" in their advertisements, coupled with an image of a pit-bull dog and the phone number 1-800-PIT-BULL. *See Florida Bar v. Pape*, 30 Fla. L. Weekly S807, 918 So. 2d 240 (Fla. 2005), *cert. denied*, 547 U.S. 1041 (2006). Like the New York rule against slogans and trade names that imply an ability to obtain results, the disciplinary rules applied—and sustained against First Amendment challenge—by the Florida Supreme Court prohibited lawyers from, among other things, "mak[ing] statements describing or characterizing the quality of the lawyer's services in advertisements." 918 So. 2d at 242. The Florida Supreme Court reasoned that the lawyers' use of the "pit bull" slogan and imagery was "inherently deceptive" because it "would suggest to many persons not only that the lawyers can achieve results but also that they engage in a combative style of advocacy"—implications that could not be subject to measurement or verification. *Id.* at 244. "Lawyer advertising," the court explained, "enjoys First Amendment protection *only* to the extent that it provides accurate factual information that can be objectively verified," and the unverifiable claims implied by the "pit bull" slogan therefore "f[ell] outside the protections of the First Amendment." *Id.* at 247, 249 (emphasis added).

Similarly, in *In re PRB Docket No. 2002.093*, 177 Vt. 629, 630, 868 A.2d 709, 709-10 (2005), the Supreme Court of Vermont upheld against First Amendment challenge a penalty imposed on an attorney for placing an

advertisement in the *Yellow Pages* describing his law firm as "INJURY EXPERTS." After reviewing this Court's decisions on attorney advertising, the Supreme Court of Vermont held that the advertisement "f[ell] squarely within th[e] category of qualitative advertising claims that are not susceptible of measurement or verification," and therefore could be prohibited as "'likely to create an unjustified differentiation and expectation among those reading the advertisement about the results which can be achieved by a lawyer claiming to be an expert.'" 177 Vt. at 631-32, 868 A.2d at 712 (quoting Vt. R. of Prof'l Conduct 7.1). Having reached that conclusion, like the Supreme Court of Florida in *Pape*, the Supreme Court of Vermont did not find it necessary to analyze the State's interest in prohibiting the advertisements under the *Central Hudson* test.

In re Keller, 792 N.E.2d 865 (Ind. 2003), is also to similar effect. There, attorneys with the Keller & Keller law firm were sanctioned for violating an Indiana rule that prohibited lawyers from including in any public communication, *inter alia*, "a representation or implication regarding the quality of legal services." *Id.* at 868. The attorneys had run television commercials depicting fictional scenes in which an insurance company claims adjuster would say to his colleague, upon learning about the law firm's representation of a claimant, "Keller & Keller? Let's settle this one." *Id.* at 866-67. Rejecting the attorneys' argument that the discipline infringed their commercial-speech rights, the Supreme Court of Indiana reasoned that the commercials contained "a representation or implication regarding the quality of their legal services," which implied that their clients

would "achieve favorable results based solely upon" the attorneys' reputation with insurance companies. *Id.* at 868. Because the advertisements were "more likely to deceive the public than inform it," the court explained that they were "not protected under the First Amendment." *Id.* at 869; *see also Medina County Bar Ass'n v. Grieselhuber*, 78 Ohio St. 3d 373, 374-75, 678 N.E.2d 535, 536-37 (1997) (rejecting commercial-speech challenge to discipline imposed for attorney's use of advertisement containing the slogan, "We Do It Well," which "contain[ed] unverifiable as well as misleading statements").

These cases from the highest courts of various States support the view advocated by New York State below—but explicitly rejected by the Second Circuit—that advertisements containing unverifiable claims about the quality of legal services are not subject to the First Amendment's protections for commercial speech. Furthermore, multiple state supreme courts across the Nation have upheld disciplinary actions based on publication of advertisements containing similar unverifiable claims, apparently based on the implicit premise that such discipline does not offend the First Amendment. *See, e.g., Iowa Sup. Ct. Attorney Disciplinary Bd. v. Bjorklund*, 725 N.W.2d 1, 6 (Iowa 2006) (attorney disciplined for online publication of claim that his firm's "scholarly achievements [were] unmatched by any other law firm"); *Office of Disciplinary Counsel v. Furth*, 93 Ohio St. 3d 173, 177, 186, 754 N.E.2d 219, 225, 232 (2001) (attorney violated rule against "unverifiable and self-laudatory" statements when he published online claims that, *inter alia*, he was "[a] passionate and aggressive advocate on

behalf of his clients," and provided "[t]op notch legal services with a guarantee of satisfaction") (emphasis omitted); *In re Wamsley*, 725 N.E.2d 75, 77 (Ind. 2000) (attorney whose advertisement stated that he could obtain the "best possible settlement" in the "least amount of time" violated rule against misleading and self-laudatory statements); *Florida Bar v. Lange*, 23 Fla. L. Weekly S263, 711 So. 2d 518, 521 (Fla. 1998) (advertisement that stated "When the Best is Simply Essential" violated rules of professional conduct because it was "self-laudatory and purport[ed] to describe the quality of [the lawyer's] services"); *In re Anonymous*, 689 N.E.2d 442, 444 (Ind. 1997) (attorney's slogan, "the track record and resources you need to win a settlement," was a self-laudatory and unverifiable claim likely to create an unjustified expectation as to results).[7]

Nor can the decision below be reconciled with the many state supreme court decisions that have sustained against First Amendment challenge discipline imposed

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7. Also in tension with the decision below are several decisions of the lower federal courts. *See Farrin v. Thigpen*, 173 F. Supp. 2d 427, 440, 447 (M.D.N.C. 2001); *Spencer v. Honorable Justices of the Sup. Ct. of Pa.*, 579 F. Supp. 880, 887-88 (E.D. Pa. 1984), *aff'd*, 760 F.2d 261 (3d Cir. 1985) (unpublished); *Bishop v. Comm. on Prof'l Ethics*, 521 F. Supp. 1219, 1225 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982). On the other hand, other federal cases are more consistent with the decision below. *See Mason v. Florida Bar*, 208 F.3d 952, 954, 957-58 (11th Cir. 2000); *Allen, Allen, Allen & Allen v. Williams*, 254 F. Supp. 2d 614 (E.D. Va. 2003); *see also Public Citizen, Inc. v. Louisiana Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 554, 557-58 & n.12 (E.D. La. 2009). To the extent that there was a pre-existing conflict of authority prior to the decision below, this Court's review is all the more necessary to resolve that conflict.

for *any* use of a trade name in attorney advertising—even including those that do not imply an ability to obtain results. *See, e.g., In re Sekerez*, 458 N.E.2d 229, 243 (Ind.), *cert. denied*, 469 U.S. 856 (1984); *Mezrano v. Alabama State Bar*, 434 So. 2d 732, 736 (Ala. 1983); *In re Certificate of Authorization for Corporate Name Oldtowne Legal Clinic, P.A.*, 285 Md. 132, 138-41, 400 A.2d 1111, 1115-16 (1979).[8] The New York rule invalidated here is substantially narrower, and yet the court below—in contrast with these decisions—held that it violated the First Amendment on its face.

This conflict between the decision below and multiple decisions of the States' highest courts is particularly significant because the States perform a unique role in promulgating and enforcing rules of professional conduct for attorneys. See Point II, *infra*. Except in rare cases involving review by this Court, many state supreme courts have the final word on the application of their rules of professional conduct for attorneys; as a result, a large body of law in the area of commercial-speech protection for attorney advertising consists of decisions from these courts. This Court should grant review to eliminate this split of authority and bring uniformity to the law.

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8. In reaching this conclusion, these courts have generally followed *Friedman v. Rogers*, 440 U.S. 1 (1979), a case that the court below purported to distinguish. In *Freidman*, this Court held that Texas did not violate the First Amendment in prohibiting the use of trade names by optometrists, noting that "[a] trade name is . . . a significantly different form of commercial speech" from that encountered in the Court's early commercial-speech cases, because it is "a form of commercial speech that has no intrinsic meaning." 440 U.S. at 12.

B. The Court of Appeals' Invalidation of the Irrelevant-Techniques Rule Conflicts With Various Decisions of State Courts of Last Resort, Including One Upheld By this Court in a Summary Dismissal.

In striking New York's rule prohibiting the use of attention-grabbing advertising techniques that contain information that is clearly and intentionally irrelevant to the selection of competent counsel, the decision below again collided with the decisions of various state supreme courts, including one that was upheld by this Court in a summary dismissal.

In particular, this Court has upheld against First Amendment challenge a state bar rule that was more restrictive than the New York rule prohibiting marketing gimmicks that do not aid the public in making an informed decision, based on relevant and objective facts, about the selection of counsel. *See Committee on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Humphrey*, 355 N.W.2d 565 (Iowa 1984), *vacated and remanded*, 472 U.S. 1004 (1985), *after remand*, 377 N.W.2d 643 (Iowa 1985) (*en banc*), *appeal dismissed for want of substantial federal question*, 475 U.S. 1114 (1986). In *Humphrey*, attorneys unsuccessfully argued that the First Amendment barred state rules that (a) prohibited attorneys from making claims about "the quality of [their] legal services," when such claims either were unverifiable or "appeal[ed] to the emotions, prejudices, or likes and dislikes of a person," and (b) required that attorney television advertisements be

presented "in a dignified manner," without dramatics, background sound or unnecessary visual displays. 355 N.W.2d at 568-69.[9]

Noting the "'special problems' of television advertising," *id.* at 569, the Supreme Court of Iowa upheld the constitutionality of the rules. Citing this Court's decision in *Bates*, Iowa's highest court held that information that is irrelevant to the purpose of attorney advertising—*i.e.*, to enable the informed and intelligent selection of counsel (see p. 25, *infra*)—does not qualify as commercial speech that is protected by the First Amendment:

> [i]nformation is not relevant if it makes no contribution to informed decision making. In other words, prohibition of such information does not impede, and in fact advances, the fostering of rational decision making and maintaining of the bar's professionalism.

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9. The television advertisements in *Humphrey* featured actors portraying laypersons in various scenarios, including medical personnel in an examination room. In each scene, the actors described an injury caused by negligence, and stated that the injured person would need to talk to a lawyer and that the choice of the lawyer was "something to think about." 355 N.W.2d at 566. The advertisements then cut to another actor playing a receptionist in a law office, with the attorneys' address and other information superimposed over the picture, while an off-stage voice urged customers to "call now" if they had suffered similar misfortunes. *Id*

> We think the ads here would not aid the public in making the informed decision which is subject to the protection recognized in *Bates*.

355 N.W.2d at 570.[10]

This Court initially vacated the Iowa Supreme Court's judgment and remanded it for further consideration in light of the then-recent decision in *Zauderer*, 471 U.S. 626. *See Humphrey*, 472 U.S. 1004. On remand, however, the Supreme Court of Iowa, sitting *en banc*, adhered to its original decision, concluding that nothing in *Zauderer* warranted a different result. *Humphrey*, 377 N.W.2d 643. Thereafter, this Court dismissed an appeal from the Iowa Supreme Court's decision for want of a substantial federal question. *See Humphrey*, 475 U.S. 1114.

Although it is settled that a summary dismissal by this Court constitutes a decision on the merits that is binding on all lower courts, *see Hicks v. Miranda*, 422 U.S. 332, 344 (1975), in the opinion below in this case, the Second Circuit brushed aside this precedent, summarily stating in a footnote that "[w]e do not find

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10. The court went on to consider the state interests in support of the challenged rule on irrelevant advertising techniques, but clarified that this analysis was "perhaps unnecessary." 355 N.W.2d at 571. In particular, the court concluded that the rule directly advanced the substantial state interest in "fostering rational, intelligent, and voluntary decision making in determining the need for legal services and selecting a lawyer." The rule also "aid[ed] the citizen in making an intelligent selection of counsel," in a way that was "[no] more extensive than necessary." *Id.*

the Iowa Supreme Court's analysis in *Humphrey* persuasive" (Pet. App. 18a n.7). Other than noting the "limits on the precedential value of summary dismissals" (*id.*),[11] the court of appeals gave no clue as to why it deemed *Humphrey* to be unpersuasive or inapposite. It thereby reached a result directly at odds with the judgment that this Court left intact in that case.

To make matters worse, the Second Circuit's invalidation of New York's rule on irrelevant marketing gimmicks is at odds with the central holdings of other decisions of state supreme courts. For example, while the result of the Second Circuit's decision is that the plaintiff law firm in this case is free to use non-informational gimmicks such as "comical scenes" depicting its attorneys "providing legal assistance to

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11. In fact, the case cited by the court of appeals regarding the precedential value of summary dismissals emphasizes that such actions "leave undisturbed the judgment appealed from" and "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). To be sure, *Humphrey* involved television advertisements, and the Supreme Court of Iowa emphasized the electronic broadcast medium. But here too, the rules challenged apply to broadcast and online advertisements (as well as other media). Indeed, the Task Force report that served as the impetus for the rules specifically cited the need for regulation in the context of "broadcast media, billboard, internet, blogs, and other forms of electronic communications by lawyers aimed at reaching the consumer in new ways" (*Task Force Report* at 2). Furthermore, the advertisements that the plaintiff law firm in this case sought to broadcast specifically included television commercials that bore many similarities to those at issue in *Humphrey*. Thus, *Humphrey* is squarely on point.

space aliens" (Pet. App. 3a, 50a), the Florida Supreme Court in *Pape*, 918 So. 2d 240, *supra*, concluded that the attorneys' "pit bull" advertisements were unprotected by the First Amendment. "[T]he image of a pit bull and the on-screen display of the words 'PIT-BULL' as part of the firm's phone number [were] not objectively relevant to the selection of an attorney," the court explained, and therefore "d[id] not assist the public in ensuring that an informed decision is made prior to the selection of the attorney." *Id.* at 242, 245. As a result, these gimmicks ran afoul of the Florida rule that advertising must be, *inter alia*, "objectively relevant to the selection of an attorney," *id.* at 242, 249, and the First Amendment presented no bar to enforcement of that rule.

Similarly, in adopting advertising rules for its attorneys, the New Jersey Supreme Court has affirmed the constitutionality of a rule that required all such advertising to be "predominantly informational"—*i.e.*, "that in both quantity and quality, the communication of factual information rationally related to the need for and selection of an attorney predominates." *In re Felmeister & Isaacs*, 104 N.J. 515, 516-17, 528, 531, 518 A.2d 188, 189, 194, 196 (1986). The New Jersey Supreme Court has prohibited advertisements that "rely[] in any way on the shock or amusement value of absurd portrayals wholly irrelevant to the selection of counsel" (104 N.J. at 517, 518 A.2d at 189; *see also* N.J. Rules of Prof'l Conduct R. 7.2(a))—a description that equally could be applied to the "comical scenes" depicted in the advertising used by the plaintiff law firm in this case. *See* Pet. App. 4a; *see also In re Zang*, 154 Ariz. 134, 145-46, 741 P.2d 267, 278-79 (1987) (*en banc*) (noting in dicta that "dramatic, nonfactual advertisements are more

likely to misrepresent or omit material facts, or to create unjustified expectations about the results a lawyer can achieve than are advertisements that primarily convey factual information that will help consumers make rational decisions about whether to seek legal services."), *cert. denied sub nom., Whitmer v. State Bar of Ariz.*, 484 U.S. 1067 (1988).

In contrast with the decision below, these state supreme court decisions are consistent with the overarching goal of attorney advertising, as recognized by this Court—to impart "*relevant* information needed to reach an informed decision," *Bates*, 433 U.S. at 374 (emphasis added), about the selection of counsel. *See also Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108 (1990) (plurality opinion) (the extent to which attorney advertising may be regulated is guided "by the principle that the disclosure of truthful, *relevant* information is more likely to make a positive contribution to decisionmaking than is concealment of such information") (emphasis added).

II. THE QUESTION PRESENTED IS A RECURRING ISSUE OF NATIONAL IMPORTANCE, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT

A. This Case Presents a Question of Exceptional National Importance.

The question presented here is a frequently recurring issue of national importance that warrants a uniform resolution by this Court at this time. As a result of the Second Circuit's decision, lawyers in New York State may freely market themselves using slogans such as "the Heavy Hitters" or "the best in the business," as

well as other gimmicks that do not "facilitate the process of intelligent selection of lawyers," *Bates*, 433 U.S. at 377 (citation and quotation marks omitted).[12] On the other hand, in light of the prevailing state supreme court decisions in other States (including, for example, the decisions of the Supreme Courts of Florida and Iowa), lawyers in those States may be subject to discipline for using the very same practices. These disparate results call for a uniform response from this Court.

In addition, to the extent that the decision below is followed elsewhere, it threatens to disrupt the efforts of the States in performing their traditional role of regulating the professional conduct of attorneys who are licensed within their borders. "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions." *Leis v.*

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12. While courts have recognized that certain forms of "puffery" may be permissible in the context of advertising of *standardized products*, this Court has repeatedly explained that advertising about *legal services* poses special problems. For example, the Court has noted that, like doctors, lawyers "do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 n.25 (1976); *see also In re R.M.J* , 455 U.S. at 200 ("advertising by the professions poses special risks of deception"). "'[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.'" *In re R.M.J.*, 455 U.S. at 200 (quoting *Bates*, 433 U.S. at 383).

Flynt, 439 U.S. 438, 442 (1979). Indeed, this Court has "recognize[d] that the States have a compelling interest in the practice of professions within their boundaries, . . . [and the] interest of the States in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (citation omitted).

Related to this overarching interest are the more specific state interests—acknowledged as "substantial" by the court below—in "prohibiting advertising and solicitation practices that disseminate false or misleading information" (Pet. App. 20a) (quoting *Task Force Report* at 1-2), and protecting the image and reputation of the legal profession by appropriately regulating the conduct of attorneys (Pet. App. 26a) (citing *Went For It*, 515 U.S. at 635 (noting Florida's "substantial interest . . . in preventing the erosion of confidence in the [legal] profession")). In particular, the ability of the States—and, in States like New York, the state *judiciary*—effectively to police the conduct of their attorneys not only affects the nature of the legal services that clients reasonably should expect, but also the public's perception of attorneys in general and, by extension, their faith in the entire judicial system. "From the early history of the common law to this day, lawyers have been inextricably linked in the minds of persons generally, as well as in fact, to the functions of the courts and the adjudication process." *Humphrey*, 377 N.W.2d at 648 (Reynoldson, C.J., concurring specially).

The ramifications of the decision below are particularly unsettling in New York State because the rules that the Second Circuit invalidated emanate from the organ of government—the Judicial Branch—that has traditionally exercised oversight over the conduct of its attorneys as officers of the court. *See Cohen v. Hurley*, 366 U.S. 117, 124 (1961) ("lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes"), *overruled on other grounds*, *Spevack v. Klein*, 385 U.S. 511 (1967).[13]

In light of these important interests, it is no wonder that many States have promulgated rules on attorney advertising that are, in many respects, similar to the New York rules at issue here. For instance, no fewer than thirty States have rules that prohibit unverifiable or unsubstantiated statements regarding the quality of legal services (primarily focusing on

13. Unlike advertising of fungible products, attorney advertising seeks to induce members of the public to enter into a *fiduciary* relationship—in other words, a special relationship that entails higher obligations of probity than the arm's-length relationships that typify the commercial marketplace. Because of these distinctions and others, at various times, Members of this Court have questioned whether the prevailing framework for analyzing attorney advertising should be revisited to allow the States "considerable latitude to ban advertising that is '*potentially* or demonstrably misleading, . . . *as well as* truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession," *Shapero*, 486 U.S. at 485 (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., dissenting)—a subject this Court may wish to consider.

comparisons with other attorneys);[14] twelve States restrict or entirely prohibit the use of trade names or fictitious names to identify an attorney or law firm;[15]

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14. *See* Ala. Rules of Prof'l Conduct R. 7.1(c) (2000); Alaska Rules of Prof'l Conduct R. 7.1(c) (2005); Ark. Rules of Prof'l Conduct R. 7.1(c) (2010); Colo. Rules of Prof'l Conduct R. 7.1(a)(2) (1998); Fla. Rules of Prof'l Conduct R. 4-7.2(c)(1)(G), (I) (2010); Ga. Rules of Prof'l Conduct R. 7.1(a)(3) (2001); Haw. Rules of Prof'l Conduct R. 7.1(c) (1994); Idaho Rules of Prof'l Conduct R. 7.1(c) (2004); Iowa Rules of Prof'l Conduct R. 32:7.1(b) (2005); Kan. Rules of Prof'l Conduct R. 7.1(c) (2006); Ky. Sup. Ct. Rules of Prof'l Conduct R. 3.130(7.15)(c) (2009); La. Rules of Prof'l Conduct R. 7.2(c)(1)(G), (L) (2010); Md. Rules of Prof'l Conduct R. 7.1(c) (2007); Mich. Rules of Prof'l Conduct R. 7.1(c) (2005); Miss. Rules of Prof'l Conduct R. 7.1(d) (2007); Mo. Rules of Prof'l Conduct R. 4-7.1(e) (2009); Nev. Rules of Prof'l Conduct R. 7.1(c), 7.2(g) (2007); N.H. Rules of Prof'l Conduct R. 7.1(c) (2007); N.J. Rules of Prof'l Conduct R. 7.1(a)(3) (2007); N.C. Rules of Prof'l Conduct R. 7.1(a)(3) (2007); N.D. Rules of Prof'l Conduct R. 7.1(c) (2007); Or. Rules of Prof'l Conduct R. 7.1(a)(3) (2006); S.C. Rules of Prof'l Conduct R. 7.1(c), 7.2(f) (2007); S.D. Rules of Prof'l Conduct R. 7.1(c)(5) (2007); Tenn. Rules of Prof'l Conduct R. 7.1(c) (2009); Tex. Rules of Prof'l Conduct R. 7.02(a)(4) (2007); Va. Rules of Prof'l Conduct R. 7.1(a)(3) (2005); W. Va. Rules of Prof'l Conduct R. 7.1(c) (2007); Wis. Rules of Prof'l Conduct for Attorneys R. 20:7.1(c) (2007); Wyo. Rules of Prof'l Conduct for Attorneys at Law R. 7.1(c) (2009).

15. *See* Ariz. Rules of Prof'l Conduct R. 7.5(a) (2007); Cal. Rules of Prof'l Conduct R. 1-400(E) (Standards ¶ 9) (1997); Fla. Rules of Prof'l Conduct R. 4-7.9(c) (2010); Ind. Rules of Prof'l Conduct R. 7.5(b) (2007); Iowa Rules of Prof'l Conduct R. 32:7.5(e) (2007) ; La. Rules of Prof'l Conduct R. 7.10(b), (c) (2010); Miss. Rules of Prof'l Conduct R. 7.7(b) (2007); N.J. Rules of Prof'l Conduct R. 7.5(a), (f) (2007); N.C. Rules of Prof'l Conduct R. 7.5(a) (2007); Ohio Rules of Prof'l Conduct R. 7.5(a) (2007); S.C. Rules of Prof'l Conduct R. 7.1(e) (2007); Tex. Rules of Prof'l Conduct R. 7.01(a) (2007).

seven States prohibit dramatizations in attorney advertising or potentially confusing or non-informational visual and verbal illustrations;[16] and three States require that attorney advertisements primarily emphasize information that is useful and relevant to the public's search for competent and appropriate counsel.[17]

This broad consensus underscores that the Second Circuit's invalidation of the rules adopted by the New York judiciary raises an important question deserving of this Court's review.

B. This Case is an Ideal Vehicle for Resolving this Recurring Issue.

This case is an excellent vehicle for resolving the issue presented because the relevant facts are undisputed; indeed, the parties stipulated to the material facts and the authenticity of the exhibits (including the plaintiff law firm's advertisements) below. *See* Pet. App. 90a-97a. In addition, the State's arguments have been preserved; the court below directly addressed the argument that unverifiable and irrelevant statements in attorney advertising are unprotected by the First Amendment, and rejected it.

16. *See* Ark. Rules of Prof'l Conduct R. 7.2(e) (2010); Fla. Rules of Prof'l Conduct R. 4-7.2(c)(3) (2010); Iowa Rules of Prof'l Conduct R. 32:7.2(e) (2007); N.J. Rules of Prof'l Conduct R. 7.2(a) (2007); Or. Rules of Prof'l Conduct R. 7.1(a)(10) (2006); S.D. Rules of Prof'l Conduct R. 7.1(c)(15) (2007); Wyo. Rules of Prof'l Conduct for Attorneys at Law R. 7.2(h) (2009).

17. *See* N.J. Disciplinary Rules of Prof'l Conduct R. 7.2(a) (2007); S.D. Rules of Prof'l Conduct R. 7.1(b) (2007); Wyo. Rules of Prof'l Conduct for Attorneys at Law R. 7.2 (2009).

See Pet. App. 15a-17a. Nor are there any procedural obstacles to resolution of the constitutional question presented.

Moreover, the time to resolve the issue that this Court foreshadowed—but did not definitively resolve—over thirty years ago in *Bates* is now. The issue has percolated through numerous state courts of last resort which, as shown above, have reached conclusions diametrically opposed to the decision below. Thus, the conflict is mature, and ripe for this Court's review.

Finally, given the new opportunities for attorney advertising spawned by electronic media (including online advertisements), this Court's intervention is particularly needed at this time. *See Task Force Report* at 2 (noting a "surge of broadcast media, billboard, internet, blogs, and other forms of electronic communications by lawyers aimed at reaching the consumer in new ways"). There can be little doubt that attorney advertising similar to that used by the plaintiff law firm in this case will continue to proliferate in all media, and that the constitutionality of the many state restrictions of such advertising likewise will continue to be challenged on a recurring basis. This Court's clarification of the controlling constitutional principles is urgently called for.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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